

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DONALD J. BANKS,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
DA1221930014-W-1

DATE: OCT 0 5 1993

Donald J. Banks, Stillwater, Oklahoma, pro se.

Gary Schmidt, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the December 28, 1992 initial decision that dismissed his appeal for lack of Board jurisdiction. For the reasons discussed below, the Board DENIES the appellant's petition, finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this

Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

We concur with the administrative judge's ultimate conclusion that the Board lacks jurisdiction over the appellant's allegation that the agency failed to select him for a GS/GM-12/13 Geneticist position based on reprisal for his alleged whistleblowing because he raised his alleged whistleblowing disclosures in connection with an agency grievance and with a Board appeal. See *Fisher v. Department of Defense*, 52 M.S.P.R. 470, 473-74 (1992); *Williams v. Department of Defense*, 46 M.S.P.R. 549, 551-52 (1991); Initial Decision at 1-3. The administrative judge's finding is supported by the record. See, e.g., Appeal File (AF), Tab 1, Supplement to Appeal Form at 2-3; AF, Tab 1, Subtab B at 89, 104-08, 113, 123, and Subtab E (copy of the appellant's prior reduction in force appeal); AF, Tabs 5, 7. While the appellant asserts on review that he also alleged below protected disclosures outside of his grievance and Board appeal, see Petition for Review at 9-14, the record does not support his assertion. Further, there is no indication that the appellant raised additional allegations before the Special Counsel. See AF, Tab 1, Subtab B at 89-113, 121-22. He is therefore precluded from raising them before the Board at this time.¹ See *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992).

¹ The appellant also contends that the Board should reconsider its decision in *Fisher*, 52 M.S.P.R. 470, in light of the Federal Circuit's subsequently issued decisions in

We note that the administrative judge did err by failing to determine whether the Board has jurisdiction over the appellant's appeal under 5 C.F.R. part 300. The appellant, a retired annuitant, specifically alleged below, in response to the administrative judge's show-cause order on the issue of jurisdiction, that the Board has jurisdiction over his appeal under 5 C.F.R. §§ 300.103(a)(3), 300.103(c), and 300.104 because the agency (a) did not consider relevant factors (i.e., education and experience) in evaluating candidates for the GS/GM-12/13 Geneticist position, (b) preselected a candidate for the position, (c) limited the number of potential applicants by specifically drafting the job requirements to suit the preselected candidate, and

Spruill v. Merit Systems Protection Board, 978 F.2d 679 (Fed. Cir. 1992), and *Eidmann v. Merit Systems Protection Board*, 976 F.2d 1400 (Fed. Cir. 1992). *Spruill*, like *Fisher*, holds that a disclosure made in a complaint of prohibited discrimination under 5 U.S.C. § 2302(b)(9) does not constitute "whistleblowing" under 5 U.S.C. § 2302(b)(8). *Spruill*, 978 F.2d at 689-92. *Eidmann* is inapplicable here because it does not address the issue of whether disclosures made in grievances or appeals constitute "whistleblowing" under 5 U.S.C. § 2302(b)(8). See *Eidmann*, 976 F.2d at 1402-08. Thus, there is nothing in either of these Federal Circuit decisions to warrant the Board's revisitation of *Fisher*.

Additionally, the appellant has submitted numerous documents with his petition for review. See Petition for Review File, Tab 3. Of those documents, three are dated after the close of the record below and one bears an incomplete date. Further, a review of all of the documents indicate that they are not material to the jurisdictional issues raised in this appeal because they do not establish that the appellant alleged before the Special Counsel disclosures other than those he made within the context of his grievances or reduction in force appeal or that he was subjected to an appealable employment practice under 5 C.F.R. part 300. See *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

(d) did not select him for the position, thus discriminating against him on the basis of his age. See AF, Tab 10; see also AF, Tab 1, Supplement to Appeal at 1, 6-12; AF, Tab 4, Subtab 1. Thus, the initial decision should have addressed this issue.² See *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). We do so here.

We find that the appellant has failed to establish the Board's jurisdiction over his appeal under 5 C.F.R. part 300. The term "employment practices" includes the "development and use of examinations, qualification standards, tests, and other measurement instruments." 5 C.F.R. § 300.101; *Kelly v. Office of Personnel Management*, 53 M.S.P.R. 511, 516 (1992). Under 5 C.F.R. § 300.104(a), an "employment practice" that was applied to a "candidate" by the Office of Personnel Management (OPM) may be appealed to the Board if it violates a basic requirement in 5 C.F.R. § 300.103. An agency's misapplication of a valid OPM requirement under 5 C.F.R. part 300 also constitutes an employment practice that is appealable to the

² We note that the administrative judge did not explicitly inform the appellant of what is required to establish an appealable jurisdictional issue with respect to his allegation that the Board has jurisdiction over his appeal under 5 C.F.R. part 300. See *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). Because the appellant addressed this jurisdictional issue in his response to the administrative judge's show-cause order and again in his petition for review, and we now consider his contention on review, we find that any error by the administrative judge in this regard did not prejudice the appellant's substantive rights. See *Fidler v. U.S. Postal Service*, 53 M.S.P.R. 440, 444 (1992).

Board. See *Maule v. Office of Personnel Management*, 40 M.S.P.R. 388, 393, *aff'd*, 892 F.2d 1050 (Fed. Cir. 1989) (Table).

In the instant appeal, the agency asserted below that the appellant did not meet the qualifications set out in the job announcement for the GS/GM-12/13 Geneticist position because he did not have the requisite training in molecular biology. See AF, Tab 4, Subtab 1. The appellant has not shown that he possessed this knowledge and that the agency misapplied to him any measurement of employment that OPM developed or applied to him an OPM measurement of employment that was invalid. His bare allegation that the agency failed to fully consider his education and experience in making a selection for the position does not establish that the agency subjected him to an employment practice that falls within the Board's jurisdiction as provided under 5 C.F.R. part 300. See *Kelly*, 53 M.S.P.R. at 516. Rather, the appellant appears to be merely challenging his nonselection for the position and the agency's alleged irregularities in the selection process, matters that are not otherwise appealable to the Board. See *Robins v. Department of Justice*, 48 M.S.P.R. 644, 650-51 (1991). Thus, while the administrative judge failed to address this issue, his failure to do so did not harm the appellant's substantive rights. See *id.*³

³ In view of this finding, we deny the appellant's request for a hearing, see Petition for Review at 15, 17-18, because he has failed to make a nonfrivolous allegation of the Board's jurisdiction over his appeal. *Manning v. Merit Systems*

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439


The court must receive your request for review no later than 30 calendar days after receipt of this order by your

Protection Board, 742 F.2d 1424, 1428 (Fed. Cir. 1984); *Kelly*, 53 M.S.P.R. at 517 n.7; *O'Neal v. U.S. Postal Service*, 39 M.S.P.R. 645, 649, *aff'd*, 887 F.2d 1095 (Fed. Cir. 1989) (Table).

The appellant also requests that the Board reopen his prior reduction or force appeal in *Banks v. Department of Agriculture*, 49 M.S.P.R. 200 (1991) (Table), *aff'd*, 956 F.2d 1172 (Fed. Cir. (Table), cert. denied, 113 S. Ct. 88 (1992). See Petition for Review at 1. The Board lacks the authority to reopen an appeal in which the Board has issued a final decision and the appellant has sought judicial review of that decision, see *Weinberger v. Department of the Army*, 55 M.S.P.R. 270, 273 (1992), unless the appellant shows that "the earlier decision was obtained by fraud, concealment, or misrepresentation by a party," *Anderson v. Department of Transportation*, 46 M.S.P.R. 341, 349 (1990), *aff'd*, 949 F.2d 404 (Fed. Cir. 1991) (Table). Finding no such showing here, we deny the request.

representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.